

Proposed BSkyB Digital Terrestrial Television Services*Ofcom Consultation – December 2008***Executive Summary**

Arqiva is very supportive of Ofcom’s approach whilst acknowledging the broader market review underway and the need for Ofcom to address the competition issues identified, especially the wholesale arrangements for Sky premium content on DTT. Nevertheless, Arqiva is keen to see the introduction of a deeper and better structured pay offering on the DTT platform. To facilitate this we agree that simulcrypt access technology should be deployed, whilst acknowledging that the introduction of this new access arrangement is likely to lead to issues needing to be resolved, in particular at the commercial level involving the Pay TV operators and the Multiplex Licence Operators. Nevertheless, Arqiva considers that the adoption of simulcrypt is important for 4 reasons:

- 1) It protects equal access for both consumers and different pay operators;
- 2) It enables the Multiplex Operator to act as a broker for fair and equal access to the market;
- 3) It drives harmonisation of the standards whilst allowing the continuance of a robust horizontal market in choice of hardware for both consumers and manufacturers; and
- 4) Simulcrypt represents an efficient use of scarce DTT spectrum as it allows multiple pay operators the potential to access common premium content.

Arqiva supports the introduction of Sky’s premium pay TV content on the DTT platform. However, as a stakeholder in the DTT platform, Arqiva is keen to ensure that the mechanism by which Ofcom permits pay services on DTT does not offer the risk that a Wholesale Platform arrangement can be created independent of the Multiplex Licence Operators resulting in a platform closed to future developments.

Arqiva also has a major concern centred on the choice of broadcast technology or standard to which the simulcrypt should apply. It is important that access to both Freeview and Top UP TV (TUTV) who both provide existing services on DTT is not seriously undermined or viewing choice is not unduly restricted by the introduction of incompatible broadcast standards or technologies.

Overall we are optimistic that given regulatory certainty the issues noted can be addressed in a timely manner and the new services can be launched in a realistic timescale. However, we are concerned that without early regulatory certainty, the risk of a significant delay to the launch of pay TV services on the platform will ultimately challenge Ofcom’s economic analysis that suggests that Option 2 provides greater welfare than Option 1.

General Response

Arqiva welcome the opportunity to respond to this consultation and whilst we are broadly in agreement with Ofcom's analysis and proposed approach to facilitate Sky's premium content onto the Digital Terrestrial Television platform. We believe it important to highlight the following points;

- The majority of the existing Set Top Box universe is incompatible with the proposed implementation of simulcrypt due to lack of a common interface, hence in order for consumers to obtain pay TV services they are likely to need to upgrade their receiver equipment.
- There is potentially a significant delay to the implementation of simulcrypt on DTT due to the likely timescales involved in achieving commercial agreement – it is not clear that the impact of this is reflected in the economic analysis presented.
- We believe that the combination of a “must offer” Wholesale Channel proposition with the introduction of simulcrypt potentially creates a position where a Wholesale Platform is created independent of the Multiplex Licensed Operator
- The proposed introduction of pay TV in DVB-T format at a time when plans are in place to launch HD DVB-T2 services potentially increases the complexity of the developments on the platform. It is important, however, that the regulatory approach does not negatively impact the rate of innovation on the platform but needs to ensure that there is a complimentary approach to both service developments. To this end, Arqiva recognises that there may be the potential for consumer confusion, but believes that this should be mitigated by the promotion of the services by the pay TV operators.

Wholesale Platform

The potential to create a Wholesale Platform provides us with the concern that the Multiplex Licence Operator could become marginalised creating a closed platform for future developments.

Response to Questions

1. Do you agree with our current view that under the Proposal, Sky would be likely to emerge as the sole or main retailer of pay TV services on DTT, given its market power in the wholesale markets for Core Premium channels and its incentives to withhold its Core Premium channels from other retailers of pay TV services?

Response: It is difficult for Arqiva to form a view on this matter as we have no experience of the retailing of content to the end consumer.

2. Do you agree with our current view that the emergence of Sky as the sole or main retailer of pay TV services on DTT and the consequent adverse effects on competition would be likely to occur in a relatively short timeframe?

Response: Although there is likely to be significant interest in Sky's premium pay content once launched on the DTT platform we believe that the rate of subscriber growth for the Sky services is still uncertain and likely to be directly impacted by the current economic climate. Furthermore, it is not clear that the judgement could be taken that Sky's services would adversely impact existing pay TV service providers in a relatively short timeframe as the outcome will be dependent on the characteristics of the product launch and the competitive response.

3. Do you agree with our current view that Sky should not be prohibited from retailing pay TV services on DTT provided that its Core Premium channels on DTT are made available to its retail competitors on a suitable wholesale basis?

Response: We believe that it is important for the DTT platform that Sky should be able to retail its pay TV services on DTT, it is up to Ofcom, as competition regulator of the sector to determine whether it should be subject to a condition to facilitate the provision of an appropriate wholesale must offer arrangement to its competitors for the Core Premium channels. However, we are concerned that the nature of the wholesale must offer arrangement is likely to result in a significant delay in the introduction of these services which will lead to a significant detriment to the platform and its long term value to the consumer. To this end we encourage Ofcom to progress as quickly as possible to a regulatory solution so as to allow commercial negotiations to begin.

4. If we were to consent to the Proposal, subject to a condition that Sky must make its Core Premium channels available to competing retailers on a suitable wholesale basis, do you agree that it would not be necessary to impose additional conditions addressing the provision of TPS by Sky?

Response: We agree that it is not necessary to impose additional conditions addressing the provision of TPS by Sky.

5. Do you agree with our current view that the Proposal is unlikely to have a significant adverse effect on the DSO process or the appeal of Freeview to consumers?

Response: We support Ofcom's position that the Proposal is unlikely to have a significant adverse effect on the DSO process or the appeal of Freeview to consumers. However, we do have concerns that the lack of co-ordination between the platform developments, including the introduction of MPEG-4 with DVB-T2 to PSB3 and the potential launch of the proposed pay TV services in MPEG2 and DVB-T format, will potentially hinder the development of the platform over the long term and increase the legacy nature of the platform and in particular the commercial multiplexes to the long term detriment of DTT. We encourage Ofcom to provide clear guidance as to the process that needs to be followed to support platform innovation and note that the timing might be ideal to co-ordinate platform developments due to the introduction of DVB-T2 to PSB3 in late 2009 with the introduction of MPEG4 with DVB-T.

6. Do you agree with our current view that the extent to which the Proposal may increase complexity in the decision-making process for consumers wishing to buy DTT reception equipment, this issue can be managed effectively without the need for imposing relevant conditions on Sky?

Response: We believe that it is in the service providers' interests to ensure clear and concise information is available for the end consumer in order to enhance the potential for customer acquisition and minimise product returns. To this end we believe that Sky and the other service providers have the necessary marketing skills and operational expertise to minimise any confusion.

Nevertheless, we refer to comments made in response to question 5 above where we encourage the co-ordination of the introduction of technical standards to support the long term sustainability and attractiveness of the DTT platform to the end consumer.

7. Do you consider that to the extent the Proposal may lead to a (greater) conflict of interests between Sky and the other members of DTVSL (the company which operates Freeview), this is a matter which in the first instance should be resolved by the relevant parties through commercial negotiation?

Response: We believe that this is a matter for the shareholders of DTVSL to resolve and we propose making no public statement in this regard.

8. Do you agree with our current view that a wholesale must-offer arrangement, under which Sky must provide wholesale access to its Core Premium channels on DTT, is the most appropriate solution for us to pursue to address the competition concerns we have identified?

Response: The proposal to require Sky to make its content available via a wholesale-must offer arrangement would appear to address the majority of competition issues. The limitations of the installed receiver base will have to be overcome by pay TV providers and this should be facilitated by the must offer arrangement encouraging a plurality of pay TV viewer propositions.

9. Do you agree that simulcrypt is the most appropriate means of allowing multiple retailers to have access to Sky's Core Premium channels on DTT?

Response: Simulcrypt appears to offer the best compromise between, usability, efficiency of channel capacity and access to the platform for multiple CA systems and multiple retailers subject to channel capacity access. However, there are considerable issues both technical and commercial that need to be addressed before such a solution can be introduced which unfortunately is likely to result in a delay to the introduction of premium content to the DTT platform.

10. Do you consider that Sky or relevant third party retailers on DTT would be provided with an incentive to reduce the effectiveness of a wholesale must-offer arrangement? If so, in what ways might they seek to achieve this?

Response: No comment

11. If we were to consent to the Proposal subject to a suitable wholesale must-offer arrangement being put in place, do you consider that any ancillary conditions would be required to ensure that it was workable from a commercial and technical perspective? If so, please explain: (i) the ancillary conditions that would be required and the specific concern(s) they would seek to address and (ii) why there would be no other practicable and less restrictive means of addressing the concern(s) in question.

Response: (i) We propose that ancillary conditions should be set to ensure that Picnic can launch as soon as the following arrangements have been confirmed / set in place;

- Appropriate third party wholesale agreements are signed with pay TV operators
- Technical operating conditions have been demonstrated to not compromise existing free to air DTT receive equipment
- Commercial terms have been agreed between content owners and multiplex operators.
- Suitable incentives are introduced to encourage innovation at the DTT platform level in terms of the operating conditions associated with pay TV services.

Furthermore, we encourage Ofcom to acknowledge that the costs involved in any trial/s to prove the operational viability of the chosen technical solution shall be borne by the pay TV service providers who will ultimately benefit from the commercial launch of these services.

(ii) No comment

12. Do you consider that our indicative analysis, summarised at paragraphs 4.7 to 4.12 and set out more fully in Annex 6, supports our current view of whether we should opt for Option 1, Option 2 or Option 3?

Response: The analysis would appear to support Option 2, however, we have concerns that the notional benefit ascribed to Option 2 maybe lost if the timescales for introduction are too protracted, i.e. the welfare profiles are coincident for Options 1 and 2 at the start but there is likely to be a lag between the welfare value of option 2 over option 1 as option 2 is an inherently more complex situation to engineer.